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WORKMEN'S COMPENSATION FOR RAILROAD WORK INJURIES AND DISEASES

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I. INTRODUCTION

In meeting the nation's demand for rail transportation, between one and two million railroad employees are daily exposed to the risk of occupational injuries and diseases. Railroading is hazardous employment. The lowest accident rate in railroad history involved a toll of 32 injuries or deaths for every 1000 employees working full time for a year. Railroad work accidents are characterized by a high severity rate—about twice that for all manufacturing—indicating relatively more fatalities and severe injuries.[1] Wherever a continuing accident problem of such magnitude exists, it is imperative to provide an orderly and equitable method of injury compensation.

The method most widely employed in this country and throughout the world to indemnify a disabled worker or his survivors for losses resulting from occupational injuries and diseases is workmen's compensation. It was evolved as a natural concomitant of large scale industry. In general, it embodies five fundamental principles and objectives: (1) That medical care and cash payments should be provided to restore the worker to health and replace lost income; (2) That it is the employer's responsibility to provide these benefits as a cost of doing business, regardless of whether the injury was caused by the employer's negligence, that of a fellow servant, or the employee himself; (3) That these remedies should be furnished promptly; (4) That they should be provided uniformly through a formula established as a matter of law in advance of the injury; and (5) That a governmental agency should administer, review or enforce the payment of compensation.

Most railroad workers in the United States have not been brought under the protection of workmen's compensation. Instead, they are covered by the Federal Employers' Liability Act,[2] a statute which retains a more primitive basis for compensation—the common-law liability of the master for injuries to his servant.

One could hardly find fault with this Act for not conforming to the general pattern if it offered a reasonably satisfactory alternative method

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* See Contributors' Section, Masthead, page 301, for biographical data.

1 For an annual summary of accidents on steam railways in the United States, see ICC, ACCIDENT BULLETIN.

2 35 STAT. 65 (1908), as amended, 45 U. S. C. §§ 51-60 (1940).

for indemnifying railroad workers for their losses. But through the years, injured railroad employees have been made to deal with a complex, expensive and uncertain system that often adds the sting of injustice and economic distress to the tragedy of injury. This system has repeatedly been characterized by Justices of the United States Supreme Court as "crude, archaic"; "unjust"; "cruel and wasteful".[3]

Analysis of the provisions and of the actual operation of this law shows that compensation, even for severe injuries, is uncertain, unpredictable and generally inadequate. Most claims are settled by bargaining between the railroad claim agent and the injured employee. Varying claims, offers, counterclaims and counteroffers are made until a settlement is reached. The law itself creates pressures and fosters tactics which degrade this bargaining in a way that was certainly not contemplated by its framers. The results resemble a lottery; settlements vary from exceedingly large to pitifully inadequate amounts.

These deficiencies cannot be overcome within the framework of the liability law; a workmen's compensation law is needed.

However, railroad workers see little hope for improvement under present state workmen's compensation laws because these laws also have serious shortcomings. To transfer railroad workers to the present state laws would mean continued inadequacy of compensation—in some cases a reduction—and in general unwarranted inequalities across geographical and jurisdictional lines.

A federal workmen's compensation law is needed to replace the present federal liability law. It should be designed to offer a satisfactory compromise to the employees and the industry. To the employees it should offer an acceptable basis for surrendering their present uncertain entitlement to full damages in favor of a certain and reasonably adequate remedy. To the railroads it should offer a reasonable and predictable liability for work injuries and diseases. The general features of a workmen's compensation law around which a compromise could be developed are suggested. Such a law is not proposed merely as a preferential system for railroad employees. Its example would be of signal value in improving workmen's compensation for other workers.

[3] Douglas, J., in Bailey v. Central Vermont Railway, 319 U. S. 350, 354 (1943), and Frankfurter, J., in Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 71 (1943), and also in Wilkerson v. McCarthy, 336 U. S. 53 (1949). These statements are very important to an evaluation of the railroad compensation system and will be cited more fully later.

II. The Federal Employers' Liability Act

(a) *Coverage*

In the great majority of work injuries occurring in the railroad industry the liability of the railroad is governed by the Federal Employers' Liability Act.[4] The Act was first passed in 1906 but was declared unconstitutional as extending beyond the scope of federal interstate commerce jurisdiction.[5] It was passed with appropriate modifications again in 1908[6] and amended twice since, once in 1910[7] and more recently in 1939.[8] Its jurisdiction extends to injuries incurred by employees of interstate railroads while engaged in interstate commerce. Interstate roads, however, account for a very large proportion of the industry; the range of activities which bring their employees under the scope of interstate commerce is very broad. Since the 1939 amendments any employee, any part of whose duties is the furtherance of interstate commerce, or who in any way directly or closely and substantially affects such commerce, is considered as employed in interstate commerce when an injury occurs. Even before the amendments, over 80 per cent of work injuries on Class I railroads and over 60 percent on other roads were covered by the Act. Today, an even greater proportion comes under its jurisdiction.[9]

Employees not covered under the federal act are, for the most part, insured under state workmen's compensation acts; in some 21 states they are covered by employers' liability acts patterned generally after the federal law.[10] A small fraction come under the Jones or Merchant Marine Act[11] or the Longshoremen's and Harbor Workers' Compensation Act;[12] the remainder have no statutory remedy.

Although railroad injuries come preponderantly under the jurisdiction of the federal law, there is occasional uncertainty as to which law governs a particular work injury. The proper governing law must be determined for each injury claim. Generally, and especially before 1939, the question was whether the injury was incurred in interstate com-

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4 35 Stat. 65 (1908), as amended, 45 U. S. C. §§ 51-60 (1940).

5 34 Stat. 232 (1906). The Employers' Liability Act Cases, 207 U. S. 463 (1908).

6 35 Stat. 65 (1908), 45 U. S. C. §§ 51-59 (1940).

7 36 Stat. 291 (1910), 45 U. S. C. §§ 56, 59 (1940).

8 53 Stat. 1404 (1939), 45 U. S. C. §§ 51, 54, 56 and 60 (1940).

9 Railroad Retirement Board, Work Injuries in the Railroad Industry, 1938-40 (1947). This two volume study will be referred to as Work Injuries.

10 Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington and Wyoming.

11 41 Stat. 988 (1920), 46 U. S. C. §§ 861, 862 (1940).

12 44 Stat. 1424 (1927), 62 Stat. 602 (1948), 33 U. S. C. §§ 901, 902 (Supp. 1949).

merce. This is often an exceedingly difficult matter to determine in an industry a majority of whose employees are not directly engaged in transportation but in a multiplicity of auxiliary operations. In more than 40 cases the U. S. Supreme Court gave extended consideration to this question without being able to establish sufficiently definite criteria to guide state and lower federal courts.[13]

Even after the 1939 amendments[14] expanded the criterion for determining whether the employee was engaged in interstate commerce, the decision is no obvious matter in many cases. Should the employee advance his claim under the wrong statute, he may fail to recover anything or may be delayed in receiving compensation for several years.[15]

(*b*) *Provisions*

Under the federal liability act the basis on which an injured employee may seek to recover damages for his injury is the common law rule of negligence. As in common law, the carrier is liable for damages only if the injury or death resulted in whole or part from the carrier's negligence. The Act, however, abrogates or modifies certain of the defenses allowed the master under common law. The fellow-servant defense is abolished.[16] The defense of contributory negligence is modified so that it no longer bars recovery but serves to reduce damages in proportion to

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[13] Frankfurter and Landis in *Business of the Supreme Court at October Term 1931,* 46 HARV. L. REV. 226, 249 (1932) stated:

> The deepest significance of these cases is the proof they furnish of the futility of the Act itself. When the process of interpretation and application after 25 years still yields unabated litigation and reveals an apparently growing inability on the part of the judges primarily trusted with its administration to know its meaning, surely the legislation has proven a failure.

See also Schoene and Watson, *Workmen's Compensation on Interstate Railways,* 47 HARV. L. REV. 389 (1934).

[14] See note 8 *supra.*

[15] This may be illustrated by a case of which I have direct personal knowledge. A wood car builder was injured on November 8, 1939, by a steel splinter lodging in his left eye. Infection set in and the eye was removed. Assuming that the injury, which occurred in a maintenance of equipment shop, came under the state workmen's compensation jurisdiction, the employee applied for, and was awarded, cash benefits and medical treatment under the compensation law. The employer, however, appealed the award claiming that the case came under the Federal Employers' Liability Act. On October 12, 1940, review by an appellate court was obtained denying workmen's compensation jurisdiction. The case was then appealed to the state supreme court which on February 20, 1942, sustained the appellate court. The employee, interviewed later in 1942, was uncertain as to whether he would endeavor to collect damages under the Federal Employers' Liability Act. Over two years had passed since the injury had occurred. Thus far he had received no payment, nor had he any assurance of payment under the federal act. In fact, before the 1939 amendments, the two-year statute of limitations would have prevented him from filing suit.

[16] 35 STAT. 65, 1 (1908), as amended, 45 U. S. C. §§ 51-52 (1940).

the amount of negligence attributable to the employee (comparative negligence).[17] Before the 1939 amendments the employer, if he had not violated a safety statute, could plead that the employee had assumed the risks of the job; the amendments unconditionally invalidated this defense.[18]

(c) *Enforcement*

The only provisions of the Act bearing on its enforcement are that an injured employee or survivor may bring action in a federal or state court within three years from the date of injury.[19] The Act also voids any contract, rule, regulation or device whose purpose is to enable the carrier to exempt himself from liability under the law.[20] The 1939 amendments amplified this provision by specifying, in addition, that such a rule or device may not be used to prevent an employee from furnishing information to an interested party as to the facts incident to the injury or to the death of a fellow employee.[21]

In essence, the liability act amounts to little more than a broad statement of principles whose application to specific injuries is surrounded with a great deal of uncertainty. Only the courts are empowered to determine the respective rights of the employer and employee. Resort to the courts, however, is beset with so many difficulties for the employee and pitfalls for the railroad, that it is avoided wherever possible; the procedure out of court is very unsatisfactory.

(d) *Factors Inhibiting Court Adjudication*

Most employees are understandably apprehensive about "starting trouble" with the railroad. It is hardly to be expected that they can initiate court proceedings against their employer without the fear that by so doing they will jeopardize their chances for further employment. Employees are theoretically protected against the employer's retaliation by the section of the Act which voids any device by which the carrier may seek to exempt himself from liability.[22] Moreover, under collective bargaining agreements an employee may not be dismissed except for good cause. Then, too, employees discharged for filing suit against the employer are, on appeal, generally reinstated with back pay. Nevertheless, according to the accounts of injured employees, the belief is widespread that to bring a claim to court is to invite dismissal. This threat

17 *Id.* at § 3.
18 *Id.* at § 4.
19 *Id.* at § 6.
20 *Id.* at § 5.
21 *Id.* at § 10.
22 See note 20 *supra.*

is used frequently by claim agents in dissuading employees from filing suit or even engaging an attorney.[23]

Even without such threats, a satisfactory settlement may well be considered secondary in importance to a chance for future employment. If the employee is only partially disabled, he may want the railroad to offer him a "lighter" job which he can perform with his reduced capacity for work. He naturally believes that a "cooperative attitude" will improve his chances for such a job. If he is permanently disqualified from employment he, or his widow in a fatal injury, may still hope to obtain a job for his son or another family member.

A second factor which makes access to courts difficult is the cost of attorney services. In deciding whether to hire an attorney, the injured employee is faced with the practical certainty of paying out 25 percent of his settlement, and the probability of paying considerably more. Contingency fees of one-third of the settlement are customary; in approximately one out of eight non-fatal cases half or more of the settlement is paid the attorney.[24]

The employee has to weigh the advantages of attorney representation and court enforcement not only against their cost but against the delay in settlement they invariably bring. Whereas a case settled directly between the two parties is likely to be closed within a half year, a litigated case is only infrequently settled by that time; in many contested claims payment is deferred for a year and in some instances much longer.[25]

(e) *Small Proportion of Claims Adjudicated by Courts*

It is hardly surprising, therefore, that relatively few injured workers bring their claims into court or hire an attorney to negotiate on their behalf. The Railroad Retirement Board, investigating the procedures followed in settling claims, found that suit was filed in less than three percent of the injuries.[26] Only in permanent-total disability was the

[23] The Railroad Retirement Board's investigation produced statistical evidence that the employees' fears were not unfounded. Only cases of regular employees whose disabilities were such as to permit a return to work were considered in compiling the statistics. While the proportion of such workers who failed to return to work for the employer was negligible if they did not file suit, in almost half the cases where suit was filed, the employee did not get back to work. Even attorney representation diminished the probability of return to work. WORK INJURIES, *supra* note 9, at 38.

[24] *Id.* at 39-42.

[25] *Id.* at 152-155. For a more extended discussion of this point, see "Delay in Payments," pp. 249-250, *infra*.

[26] Excluding temporary total disabilities of less than 4 days. WORK INJURIES, *supra* note 9, at 44.

proportion of cases brought to the courts as high as 45 percent. Even for fatal injuries the proportion fell short of 30 percent, and in major permanent-partial disabilities it was less than 20 percent.[27]

Furthermore, the courts actually adjudicate only a fraction of the claims in which suit is filed. The Railroad Retirement Board found the proportion of all injury claims in which the amount of the payment was determined by the courts to be only "16 percent of the permanent-total, 8 percent of the fatal and 4 percent of the major permanent-partial claims. For claims arising out of less severe injuries, the courts passed judgment on considerably less than one percent of the total."[28]

(f) *Claims Settled by Bargaining Process*

The vast majority of severe injuries and practically all of the less serious cases are settled outside of the courts by a bargaining process between the interested parties—the employer represented by the claim agent and the employee speaking for himself or occasionally assisted by a trade union official. The methods employed in bargaining, the marketplace atmosphere which invests it, and the results which ensue can only prove shocking to anyone who values equity or has taken literally the principles set forth in the liability act.

This bargaining was strongly censured by President Taft, who objected to the common-law approach because it treated work injuries "as a personal matter of each employee" and because it put the employer and employee "on a level of dealing which, however it may have been in the past, certainly creates injustice to the employee under the present conditions."[29]

A penetrating and still valid analysis of the bargaining treatment of claims was written forty years ago by the Employers' Liability and Workmen's Compensation Commission, headed by Senator (later Justice) Sutherland, which thoroughly investigated the railroad compensation problem. The Commission observed:

> The employer, in danger of litigation, is desirous of securing a settlement as promptly as possible—his representative or claim agent keeps persistently in touch with the injured man, with a view to a possible control of the situation and for the purpose of effecting a settlement as cheaply as possible. Against this effort on the part of the employer is interposed the activity, especially in the larger cities, of attorneys who make a practice of seeking this class of business and who are equally zealous with

[27] *Id.* at 43.

[28] *Id.* at 45.

[29] Message to 62d Congress under date of February 20, 1912, transmitting the report of the (Sutherland) Employers' Liability and Workmen's Compensation Commission. SEN. DOC. No. 338, Vol. 1, 62d Cong., 2d Sess. 7 (1912).

> the employer to secure control of the injured man's claim with the idea of securing for him a better settlement and, for themselves, a substantial fee. Both sides work energetically with the injured man—the employer urging the uncertainties, the vexations of long and tedious litigation and the lawyer, on the other hand, claiming that by the proper handling of the case more money can be secured. . . .
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> The necessary results are lamentable.[30]

The injured employee cannot be imagined as equal to the railroad in knowledge with which to advance the claim. While the employee only infrequently is aided by an expert in the process of injury claims, the railroad in all cases is represented by a staff of specialists who not only are infinitely better versed in the technicalities of the law but have vastly better access to information concerning the injury. Usually while the employee is still suffering from the acute stages of disability, the claim agent is assembling a comprehensive case record, including the physician's report of the extent of disability, his evaluation of its outcome, the statements of available witnesses and the like. Obviously, long before the employee has had the time to make up his mind to file the claim, the railroad has prepared its defense in the light of a well-developed policy for processing such claims. Even where an attorney is hired by the employee, he often is not the expert in tort cases as is the attorney for the railroad company. Finally, the employee cannot evaluate the advice of the attorney and his conduct of the case as the railroad claim department can with its attorneys. Hence, the employee is occasionally badly misinformed and misled to his disadvantage.

The employee certainly cannot match the railroad in resources for developing his claim. His wages, usually, have ceased on the hour or day of the injury and often his only income is the railroad sickness insurance benefits, which cannot exceed $25 weekly, nor can they be paid for a longer period than a half year. This maximum period is insufficient to span the average settlement lag in serious and particularly in contested cases. Advances from the attorney against an anticipated settlement, at best, constitute a precarious source of income; they increase the worker's dependency on the attorney and, of course, have to be repaid.

The practices which prove to be most effective in bargaining do not make nice reading. Persuasion, misrepresentation and threats are important factors in the "adjustment" of many claims. Offers to an employee are usually presented as final and are coupled with a maximum of pressure to secure their acceptance. Thus, to illustrate a common practice, the offer made by the claim agent to a road freight engineman

[30] SEN. DOC. No. 338, Vol. 1, 62d Cong., 2d Sess. 87 (1912).

who was disabled for 206 days by the fracture of the first lumbar body was $500, with the condition that if it were not accepted, the offer would be withdrawn in two weeks, and no further offer would be made. In another case, a payment of $2,100 was offered but the employee was warned that if he did not accept it, another investigation might be made which would show that the employee had been careless.[31]

How arbitrary the bargaining process can be in settling as serious a matter as a fatal injury claim and how completely it may abandon any objectivity in the evaluation of damages are illustrated by a case cited in the Railroad Retirement Board's Report, *Work Injuries in the Railroad Industry*:

> A carman [was] fatally injured in the employ of a large western road in November, 1939. He left a widow aged 61, a daughter aged 15 and a son aged 21. The case was not settled until July, 1940, when $5,000 was paid. In the meantime, the following offers were made by the road: $1,000 in the middle of December, 1939; $2,000 five days later; $3,000 in February, 1940; $4,000 in April, 1940 and finally, $5,000 in July, 1940.

The Retirement Board went on to ask some very pointed questions about the implications of this kind of negotiations:

> A question naturally arises as to the reason for beginning with an offer of $1,000, if liability to the extent of $5,000 was finally admitted. The man died within a few hours of the accident, and the first offer was made about a month after that; a period long enough for the company to have established the circumstances under which the accident occurred, the number and age of surviving dependents, and all the other factors relevant to the determination of the correct amount due. Another question is equally pertinent: What would have happened if the widow, in need of funds and distraught by the sudden misfortune, had accepted the first offer or, for that matter, any of the intermediate offers? If $5,000 is the proper payment, then anything less than that would have deprived the survivors of what was, in effect, a debt owed them. And, finally, how much larger would the payment have been if the widow had wished to hold out longer and could have done so?[32]

In bargaining it is customary for the parties to start far apart and converge toward a medial settlement. It is to be expected that in liability cases the worker will tend to exaggerate and the railroad to minimize the loss or its responsibility for it. If a worker makes only a modest claim he risks an insufficient settlement at the point of compromise. Thus an injured employee who is acquainted with the settlement process will understandably tend to build up his claim to the maximum possible —occasionally exceeding the limits set by the facts of the injury. If he

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31 These are unpublished cases which the author reviewed in preparing the report WORK INJURIES, *supra* note 9.

32 *Id.* at 48-49.

hires an attorney he is frequently encouraged to make as large a claim as possible. An undesirable consequence of negotiations under this kind of law is that partially disabled workers are occasionally misled into believing that the best settlement will come if they claim complete disablement. By making such claims they in effect waive their job rights with the company. How tragic then are the consequences if the case collapses in court and the worker has to settle for an amount which, after the various expenses are paid, leaves him without employment and possibly with insufficient indemnification even for the injury which he did sustain. Morally, it is equally unfortunate that a claimant sometimes can secure compensation only by perpetrating successfully what is in effect a fraud.

(g) *Payments Under the Liability Act*

At the suggestion of Senator Robert F. Wagner, the Federal Coordinator of Transportation investigated the cost of railroad employee accidents in 1932. He concluded that the manner in which railroad employees were compensated for their injuries

> . . . takes on many aspects of a lottery, from which a few employees draw large awards but from which many receive insufficient awards. It is this inequity which constitutes the greatest indictment of the system and furnishes the most powerful argument in favor of a reasonable Federal workmen's compensation law.[33]

In 1941 the Railroad Retirement Board was directed by the Senate "to make an immediate, thorough, and complete investigation of the incidence of injuries and diseases incurred by employees through employment in the railroad industry and the social and economic consequences of such injuries and diseases. . . ."[34]

The Board secured detailed reports from the railroads of every work injury occurring in twelve alternate months in the years 1938-40. Interviews were held with a sample of the employees and survivors to secure their account of the injury and its consequences and to obtain information available only from them. The inquiry went further than the earlier studies into an analysis of the extent to which wage losses were incurred and restored through the payments. Data were obtained, in some instances for the first time, on the delays from injury to payment, the expenses involved in litigation, and the dispositions made of the settlement payments.

The total cash value of the loss of income sustained by the employees

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[33] SEN. DOC. No. 68, 74th Cong., 1st Sess. 5, 6 (1936).

[34] SEN. RES. No. 128, 77th Cong., 1st Sess. (1941).

and survivors in the twelve sample months studied by the Railroad Retirement Board was estimated at $24,000,000. Compensation paid employees and their families totaled $12,000,000 before legal and medical expenses were paid and less than $11,000,000 afterward. Accordingly, they were left to bear an unindemnified loss of $13,000,000. This amount reflects a restoration of less than 46 percent of lost wages.[35] It is a minimal estimate of the economic losses and hardly supports the concept that compensation is also being paid for the human costs in pain, anxiety, disruption of family life, and the many other intangible but important costs of disabilities suffered by employees in the course of their employment.

When averages were computed based on all payments for a class of disability, the results were often surprisingly or even shockingly low.

(*h*) *Average Payment for Fatal Injuries*

The average payment made for fatal injuries in the years 1938-40 was only $5,200. In cases where the employee was survived by a widow and/or children it was $6,300. Payments to a worker's immediate family in a death claim averaged only 3.2 years of his full-time earnings. This was also the average for non-attorney cases. Attorneys secured an average payment of only 2.7 years where no suit was filed and 3.9 years where the case was filed in court.[36] After allowance is made for legal costs the overall average payment comes to about 3 years' wages; the differential between court cases and non-attorney cases is thus more than eliminated. The inadequacy of three years of wages as "damages" to a worker's primary dependents, supposedly to compensate them for the loss of the financial support which the wage earner would have provided, let alone an allowance for the care and counsel of which they were deprived, is too obvious to require comment.

Payments made for fatal injuries stand out as particularly wanting in adequacy. In other types of disability the employee can at least state his case; in fatal injuries there occasionally are no witnesses or, what is more disturbing, the only witnesses may also be employees of the carrier who are reluctant to testify against the company.

(*i*) *Average Payment for Permanent Total Disabilities*

For injuries which disabled the worker so as to prevent him from engaging in any regular employment for the rest of his life, the payment was more than twice that in fatal cases. In such permanent total dis-

35 WORK INJURIES, *supra* note 9, at 6.

36 *Id.* at 95; Vol. 2, Appendix C, Table C-16.

abilities the payment, theoretically, should be greater since the worker himself must be maintained in addition to the family. Obviously the settlements were, in addition, helped by the fact that the worker was himself present to advance his claim. The average was approximately $12,000. This represents compensation for nearly six years at full wages. In attorney cases, the payment amounted to 7.7 years of wages as compared with 4.9 for non-attorney cases. However, after allowance is made for attorney's fees, the difference comes to about a half year's wages. On the average there was a restoration of about 60 percent of the wage losses resulting from the injury.[37]

(*j*) *Average Payments for Permanent Partial Disabilities*

The averages for disabilities classified as permanent and partial reflect the cash valuation placed on human limbs. The average payments for the complete loss of an arm, leg, hand, or foot were, respectively, $8,100, $8,500, $6,100, and $6,800. Industrial blindness of one eye brought about an average payment of only $1,500. The net payments, after legal costs are deducted, represented, respectively, 3½, 4¼, 3, 3, and 1 year of full-time wages. They constituted a repayment of between one-fourth and one-half of the estimated loss of earning capacity resulting from such disabilities.[38]

(*k*) *Average Payment for Temporary Total Disabilities*

In temporary total disabilities the average payment was relatively more adequate. For disabilities exceeding three days' duration and averaging 39 days it came to $133 and amounted to a 64 percent restoration of wages. A substantial proportion of the workers received three-fourths or more of their lost pay.[39]

(*l*) *Variation in Payments*

An exceedingly wide range of payment for each type of disability seriously diminishes the assurance to any worker that he or his survivors will be justly and adequately compensated. The Retirement Board found that:

> In a few cases, particularly where death or permanent total disability or other disablements of obvious severity result, and where the responsibility of the employer is evident, very large payments are made. These stand out as dramatic instances of the liberality of payment under the liability laws, and tend to obscure the great majority of cases in which the em-

[37] *Id.* at 111, 120; Vol. 2, Appendix C, Table C-19.
[38] *Id.* at 121, 124 and 127.
[39] *Id.* at 130, 133 and 139.

ployee gets considerably less than an adequate share of his wage loss. In every class of disability there are cases of acknowledged disability of undisputed severity in which no payment at all is made to the employee or his dependents.[40]

In fatal injuries where the worker left a widow and/or children, payments ranged from nothing or a burial allowance of no more than $500, to $20,000 or more. In 2 percent of the cases 10 years or more of full-time wages were paid; in more than 10 times as many cases the payment was less than 1 year's wages.[41]

Payments as high as $50,000 were recorded for permanently and totally disabled workers. Of 110 employees so disabled, 3 were paid 12 or more years of full-time wages and 6 from 10 to 12 years. But, at the other end of the scale, 1 employee, who had also been deprived of the possibility of all future employment of any type, was paid nothing and another 13 employees received less than 2 years' pay.[42]

The almost random manner in which compensation is paid under the liability law is illustrated by payments made where the employee completely lost an arm, leg, hand or foot. The *net* payments—after legal costs are deducted—expressed in full-time wages so as to offset the variation in payment related to different wage levels, showed, for example, that of 26 employees who completely lost an arm, 3 were paid less than 1 year's wages, 5 from 1 to 2 years', 2 from 2 to 3 years', 7 from 3 to 4 years', and so forth up to 1 employee who received 9 years' pay.[43]

Even after the principal factors which are supposed to govern the amount of damages—the present value of the loss of earnings or, in a fatal injury, the cash contribution that the employee would have made to his dependents throughout his lifetime—are taken into account, the disparity in treatment remains. Under the provisions of the Act, the only additional factor, apart from the intangibles of pain and suffering or care and counsel, which should influence payments is the relative evaluation of employer and employee negligence. But the dispersion of payments is not explained by this factor. The allocation of respective negligence of the parties would probably result in a bunching of cases at no payment, full payment and at such degrees of repayment as one-fourth, one-half, and three-fourths. No expert investigating body could possibly produce the distribution of payments which occurs.

The Railroad Retirement Board was moved by these facts to conclude:

It is plain that the provisions of the liability acts are only indirectly

[40] *Id.* at 145.

[41] *Id.*, Vol. 2, Appendix C, Table C-17.

[42] *Id.*, Vol. 2, Appendix C, Table C-19.

[43] *Id.* at 128.

and remotely related to the settlements arrived at as a result of the bargaining process described above. Too many considerations which do not come within the purview of the acts enter into the negotiations and strongly influence its outcome. For that matter the very process of bargaining, in the course of which successively higher bids are tendered by the claim agent as the price of the release, is alien to the spirit and letter of the law. For despite their vagueness, the acts do establish, under certain conditions, a liability in damages and it is inconceivable that there can be so many and so large changes in the measurement of damages as actual cases disclose.[44]

(*m*) *Delay in Payments*

Nearly half of the more seriously injured employees had to wait more than a half year before they received any payment at all under the liability law. The Railroad Retirement Board's investigation revealed that many waited two or three years for any payment.[45]

Delays are most directly related to the kind of negotiations employed by the parties. If the employee has, for example, a major permanent partial disability, the chances are better than even that his claim will be settled within 6 months, if he does not go to court or hire an attorney. However, if he files suit, the probability is only one in four that the claim will be closed within a half year; the chances are more than two out of five that the case will still be unsettled at the end of a year. The longer delays are, of course, not entirely attributable to the complications of legal and court procedure. The cases which go to attorneys are often inherently more controversial. On the average, employees wait from 5 to 9 months before hiring an attorney. In four out of five cases employees do not hire counsel until they have received an initial offer from the employer which they regard as too low to permit hope of a satisfactory settlement.[46]

Longer delays are inherent under the liability law. As the almost universal mode of settlement is a single lump-sum payment in return for a complete release of liability, a premature settlement is inadvisable from the employee's viewpoint because it may not take cognizance of the full extent of injury. Even so, the delays are often futile because, despite them, sequels to the injury that were not compensated for in the settlement arise in a substantial portion of cases. The employee may also delay payment by holding out for an unrealistic amount; however, an employee who has observed that the longer he holds out the higher the employer's offer, may naturally attempt to maximize his compensation by prolonging the negotiations.

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[44] *Id.* at 48.

[45] *Id.* at 155.

[46] *Id.* at 152-155.

Nevertheless, delay is a far more effective weapon in the hands of the employer for bringing the employee around to settlement on the employer's terms. No small number of employees reported to the Railroad Retirement Board that they had accepted what they regarded as insufficient payments in preference to delays and uncertainties. This is especially true when, after winning a court award, the threat of further delays associated with appeals by the employer might defer payment for years.

(*n*) *Disposition of Settlement Payments*

An appraisal of the liability act cannot stop with the amount of money that is specified in the settlement. The analysis must go much further; it must inquire into the uses that are made of the money and it must answer the question: how effectively is the settlement used to fulfill its intended purpose—to restore the damages lost as a result of the injury, to develop an income which replaces that which has been lost?

First it must be recognized that the employee or survivor does not dispose of the full amount of the settlement. The attorney's fee is the first charge against the settlement payment and is in fact usually deducted from such payment before it is turned over to the employee or survivor. Then, there are other expenses related to the negotiations for a settlement. These include travel expenses, cost of living away from home during legal proceedings, cost of obtaining the testimony of legal and technical specialists and the like. In addition, there are medical costs which are linked to attorney representation and litigation when the employee cannot accept the medical care that is customarily offered by the employer because he needs independent medical care and, possibly, testimony. The employee must also repay any advances for living expenses made by the attorney, loans incurred and debts accumulated while awaiting settlement. It is only after these obligations are met that he can begin to dispose of his money.

The accounts given by injured workers or survivors of the disposition of their funds to the interviewers of the Railroad Retirement Board are far from reassuring as to their effectiveness in replacing lost income. Smaller amounts, as is to be expected, were spent mainly for living expenses after the settlement. Investments were infrequent and where they did occur, often involved small enterprises where business failures most frequently occur.[47] Whether the investments proved successful

[47] *Id.* at 166-167. See also *Business Population,* 29 SURVEY OF CURRENT BUSINESS 22 (Feb. 1949), Churchill and Foss, *State Estimates of the Business Population,* 29 *id.* 8 (Dec. 1949), *Business Population Edges Down,* 29 *id.* 7 (Nov. 1949), *Business Population,* 30 *id.* 31 (Feb. 1950).

could not be systematically verified but there was little to offer assurance that they would.

Lump sum payments are often very poorly disposed of by persons who are not normally accustomed to holding and investing money. Many persons are not aware that $15,000 in cash awarded to a worker at age 35, is likely to be equivalent to only $50 to $85 monthly for the rest of his life, depending on whether his life expectation was impaired.[48] Deceptive in size, the lump sum is a temptation to unsound expenditures or investments.

All of our social insurance laws, private annuity contracts, and many health and accident insurance policies, have recognized the necessity for periodic payments. The reason is the safety which comes with the assurance of a steady income. The liability act is almost alone today in its failure to concern itself with this very important aspect of the security of injured workers; with characteristic haphazardness it lets the monies fall where they may.

(o) *Administrative Costs*

Administrative costs under the Federal Employers' Liability Act are excessive. The Railroad Retirement Board found that the aggregate cost to employers and employees to process work injury claims in 1938-40 was $3,166,000 per year.[49] Compared to the average annual net benefit to employees and survivors of about $11,000,000 the administrative costs amounted to 29 percent.

In part, the reason for this high cost is the duplication of expenses inherent in the system, whenever both parties are compelled to employ legal counsel to protect their respective rights. Employees must occasionally incur large expenses to obtain a reasonable settlement, especially when they feel that alone they cannot bargain successfully with the claim adjuster. The average annual cost of such services for the years 1938-40 was $1,112,000.[50] The employer must maintain a bureau to negotiate on his behalf and to protect the railroad against the possibility of exorbitant payments and against unjust claims. The process is obviously and admittedly expensive. Employers' expenditures in 1938-40 amounted to $2,054,000 annually.[51]

Only a small fraction of the total administrative cost of $3,166,000 per year was incurred in the process of ascertaining the facts necessary

[48] The value shown for normal lives was based on the 1937 standard annuity table at 2½% interest. That for disabled lives was based on the 1944 disabled railroad employees select mortality table adjusted with age set back of two years, at 2½% interest.

[49] WORK INJURIES, *supra* note 9, at 180, 181.

[50] *Id.* at 183.

[51] *Id.* at 181.

to a determination of the payment and in handling the payments themselves. The bulk was absorbed by various elements of the bargaining or litigation process, which could have been avoided under a workmen's compensation system. Savings in administrative costs under such a system could have allowed for the payment of $75 more to every injured worker,[52] or over $1,200 for every worker with a fatal or major permanent disability. In a period when only $6,300 was paid in the average death claim to the worker's immediate family, the employers actually paid a total that would have permitted each family to draw $7,500.[53] It is true that but for attorney representation and court adjudication the benefits might have been less. Under the present compensation system, employees unquestionably need competent counsel. At the same time, the wastefulness of a system which requires a 29 percent administrative cost cannot be explained away in any terms.

(p) *Comparison of Liability Act Payments with Those Under Workmen's Compensation*

If the superiority of workmen's compensation over the liability act is not made apparent by the contrast in provisions and operations, it is merely necessary to compare the actual payments under the present law with those that would have been made in the same cases under a hypothetical workmen's compensation law.

This comparison was made by the Railroad Retirement Board on the basis of a plan before the Senate Committee on Interstate Commerce in 1943.[54] The total annual cost of the present system in the years 1938-40 including in addition to cash compensation, the cost of medical care, insurance premiums and administrative costs, was $17,700,000. Under the workmen's compensation plan, costs would have totaled $26,300,000, an increase of approximately 50 percent. The workmen's compensation plan could have been financed on a long-term basis at the rate of approximately 1.5 percent of payroll.[55] It would have paid higher benefits in 95 percent of the fatal injuries, where the survivors

[52] Excluding temporary total disabilities of less than 4 days.

[53] Administrative costs under a workmen's compensation system in the same period covering the same injuries are estimated at $1,250,000. (WORK INJURIES, *supra* note 9, at 215.) The saving in administrative cost would therefore have been $1,916,000. Distributed among 25,000 workers who sustained disabilities resulting in death, permanent disability, or temporary total disability in excess of 3 days, the savings would amount to $76; allocated among 1,500 case of fatal, permanent total and major permanent partial disabilities, the savings amount to over $1,200 per case.

[54] For a description of the plan see WORK INJURIES, *supra* note 9, at 189-191; Vol. 2, Appendix F.

[55] *Id.*, c. 12.

consisted of the worker's widow and children; in more than 80 percent of the permanent total disability cases, over 90 percent of the permanent partial cases and in 75 percent of the temporary total disabilities.[56] The payments would not only have been greater but they would have been vastly more uniform in treatment, since they would not have varied according to the degree of negligence or bargaining strength of the parties, but would have treated all injuries objectively in terms of the medico-economic evaluation of their severity.

Finally, the contrast between the F.E.L.A. and workmen's compensation in promptness of payment would be enormous. Claims handled under state workmen's compensation laws are settled far more promptly. For example the Railroad Retirement Board found that in one-fifth of the major permanent partial disabilities, payments began in 2 weeks and in more than half, within a month. By 6 months almost nine-tenths of the employees who had suffered from this rather complex type of disability had received compensation.[57]

(q) *Recent Upswing in Payments*

Payments have tended upward in the years following the Railroad Retirement Board's investigation. In consideration of the higher wages and living costs, and the greater wage losses which result from injuries today, a substantial increase is required only to maintain the same levels of compensation in real purchasing power. The increase, therefore, cannot be accepted at face value; it must be critically examined to determine whether there has in fact been any significant improvement in the actual protection afforded workers. It must, moreover, be measured on the basis of all payments including those made outside, as well as in, the courts and those involving small, as well as large, amounts.

The current literature on the Federal Employers' Liability Act is permeated with misleading notions about the magnitude of payments which result from the focusing of a disproportionate share of attention on court-adjudicated awards. Court cases must, of course, be given proper weight in any systematic appraisal of the Act. However, their infrequency disqualifies them from constituting by themselves a proper basis for evaluating the railroad compensation system. Unfortunately, inflated estimates of payments based on an inadequate sampling of court cases generally go unchallenged because no systematic compilations are currently maintained of work injury settlements. Anecdotal accounts or selected lists of awards of $50,000 or more are not valid as statistical

[56] *Id.*, c. 11.
[57] *Id.*, Table 38 at 151.

samples of payments under the present system. The implication that such settlements are characteristic is obviously misleading. There is no more basis today for regarding them as representative than there would have been to accept payments of $25,000 as characteristic of settlements in 1938-40.[58]

Compilations of this type imply a fallacious appraisal of the actual value of large sums and of the relative value of lump-sum versus periodic payment. A $50,000 gross payment, which is likely to be less than $33,000 when the attorney has deducted his fee, and still less when other expenses and accrued debts are repaid, may mean no more than $115 monthly for life to a worker of 35 years whose life expectation is reasonably unimpaired.

The increase in payments can hardly be ascribed to the 1939 amendments to the law. The most important effect of those amendments was to enlarge the Act's coverage. The principal change in its substantive provisions, elimination of the assumption of risk defense, had only a small effect on settlements. This reform was long in the process of evolving; even before it was adopted the courts were reluctant to heed the assumption of risk defense. The prohibition of employer interference with the right of employees to furnish information to a person in interest was essentially an illustration intended to make more vivid the original section of the Act which voided any device by which the carrier might seek to exempt himself from liability. Unfortunately, workers still entertain some doubts as to the safety afforded by this amendment. These are reflected by the continuing need for such articles as *Are You Afraid of the Claim Agent?* printed in the October, 1943 issue of THE RAILROAD TRAINMAN and reprinted by request in the January, 1946 issue. To illustrate how little the provisions of the Federal Employers' Liability Act are involved in the increased payments,

[58] A compilation of large awards which illustrates their magnitude but at the same time is open to misinterpretation if used as a general measure of payments is the list of *Verdicts or Awards Exceeding $50,000,* 5 NACCA L. J. 223-235 (1950). The following are examples of some railroad employee injury cases extracted therefrom. $203,167: Jones v. Pa. R. Co., 353 Mo. 163, 182 S. W. 2d 157 (1944) (an 18 year old brakeman for loss of right leg and thumb and severe generalized osteomyelitis); $100,000: Southern Pac. Co. v. Guthrie, 180 F. 2d 295 (9th Cir. 1949), rehearing granted (Feb. 15, 1950) (railroad engineer past 59, loss of right leg between hip and knee); $80,000: Counts v. Thompson, 222 S. W. 2d 487 (Mo. 1949) (loss of both legs, 36 year old railroad fireman); $50,000: King v. Union Pac. R. Co., 212 P. 2d 692 (Utah, 1949) (for fatal injury to railroad brakeman). To avoid misconstruing the significance of this compilation it must be related to an appropriate base. In the first place, only those cases in the compilation are relevant which represent railroad employee injuries governed by the F.E.L.A. Secondly, such awards must be related to all payments made in a definite period or to all payments made with respect to all injuries in a specified period.

it would be necessary merely to observe the comparable increases in other injury settlements—passenger injuries, for example, which are unaffected by the liability law.[59] Finally, the data assembled by the Railroad Retirement Board included clear statistical evidence that when the amendments were enacted they had little immediate influence on the size of payments. The rise in awards came later and was coincident with general inflationary conditions beginning with the national emergency and war periods.

At all times in the history of the Act very large payments have been recorded. And they have always been infrequent. To the extent that they occur, they intensify the lottery aspect of the law and perforce bring about much more vigorous efforts on the part of the railroads to avoid liabilities of such magnitude. Until it can be shown that every worker draws adequate compensation if he becomes injured on the job there is no basis for concluding that the law has become satisfactory.

That the liability law cannot possibly improve to the point where it becomes satisfactory is also suggested by a brief review of the history of the liability and compensation acts.

III. General Recognition of Inappropriateness of Negligence as Basis for Compensation

Although the liability act was regarded as a great advance when it was first adopted in this country in 1906, there were, even then, impressive grounds for questioning the propriety of an industrial compensation system founded on the doctrine of common-law negligence. True, the Act was a codification of the most advanced gains under the liability laws, but the rising incidence of injuries to employees which accompanied our industrial development called for a more orderly and equitable system of compensation. Large scale and complex operations made it increasingly difficult to trace and to quantify the respective negligence of master and servant with respect to each injury. Apart from the technical difficulties in the way of determining negligence, there was a growing feeling that workers were entitled to insurance against any injury which might befall them on the job. Such insurance was thought to be a proper cost to the employer incident to his business. Germany had enacted a compensation law along these lines as early as 1884. The English enactment which served as a model for the Employers' Liability Act had itself been discarded close to a decade earlier

[59] The director of the claims department of a major, class 1 railroad stated, in an interview, that the settlements for other injuries had risen fully as much as those with respect to employee injuries.

in favor of workmen's compensation, and twenty other foreign countries had already accepted the latter principle.[60]

The same year that England adopted its workmen's compensation act, Oliver Wendell Holmes, then of the Supreme Judicial Court of Massachusetts, in an address entitled "The Path of the Law", commented on the obsolescence of the tort liability approach to work injuries:

> Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories and the like. . . .[61]

And he recognized the changing climate of opinion in these comments on the compensation problem:

> Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal.[62]

Two years after it passed the liability act, Congress expressed an obvious want of confidence in the measure by establishing, through joint resolution, a commission to investigate the subject of employers' liability and workmen's compensation.[63] The findings[64] of the Sutherland Commission, thus created, reflect the unanimous opinion of the United States Senators, Representatives and spokesmen for railroad management and labor, who constituted the Commission. Relating to the period 1908-10 they show the Act to have been unsatisfactory from its inception. The Commission recommended its replacement by a workmen's compensation law and drafted a bill for this purpose.[65]

President William Howard Taft, in a message which preceded the report of the Commission, said:

> I sincerely hope that this Act [the workmen's compensation bill drafted by the Commission] will pass. I deem it one of the great steps of progress

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60 See Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389 (1934).

61 Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS 183 (1920), 10 HARV. L. REV. 457 (1897).

62 Holmes, *op. cit. supra* note 61, at 182.

63 H. J. RES. No. 127, 61st Cong., 2d Sess. (1910).

64 See note 30 *supra*.

65 *S.* 5382, 62d Cong., 2d Sess. (1912).

> toward a satisfactory solution of an important phase of the controversies between employer and employee that has been proposed within the last two or three decades. . . .[66]

While the recommendations of the Sutherland Commission went unheeded so far as railroad injuries were concerned, they were adopted in most other jurisdictions where a method of compensating workers for their injuries was being sought.

(*a*) *Workmen's Compensation Legislation*

In 1908, the same year that the Employers' Liability Act was passed, the United States chose the method of workmen's compensation for its own employees.[67] In May, 1911, the first effective state workmen's compensation law became operative in Wisconsin.[68] In the decade following 1910 as many as 42 states passed such legislation and more were added as time went on. With the enactment of a compensation law by the State of Mississippi in 1948, workmen's compensation has been expanded to include workers in all 48 states, the District of Columbia and other federal and territorial jurisdictions. Outside of agricultural, domestic service and employments involving a small number of workers which are excluded from workmen's compensation, presumably for administrative reasons, railroad workers comprise the most important industrial group that is today not covered by this type of protection.

(*b*) *Objectives of Workmen's Compensation Laws*

First, workmen's compensation laws abandoned the doctrine of negligence as the basis for compensation in favor of the principle of insurance. They recognized that the fundamental problem was not to find out whose negligence had caused the injury but to provide relief for the injured employee or his survivors. Under most of the laws an injury was made compensable if it arose out of and in the course of the worker's employment. This requirement has given rise to litigation concerning the compensability of accidents, but on the whole, the principle was recognized that any disability which is reasonably related to the fact of employment should be deemed to have arisen in the course of employment. From the standpoint of accident prevention, abandonment of the legal concept of negligence was an improvement; even though theoretically the legal concept of negligence had concerned itself with isolating the causes of accidents, in practice it had tended to bring about concealment of their true origin. Many workmen's compensation laws re-

[66] See note 29 *supra*.

[67] 35 STAT. 556 (1908).

[68] Wisconsin Laws, c. 50 (1911).

quire the employers to report injuries, and they utilize merit-rating to decrease an employer's liability if the cost of compensation diminishes. To prevent accidents, the more modern method of compensation associated with advanced methods of safety engineering has proved more effective.

Second, workmen's compensation laws generally recognized the inherent inequality of worker and employer under the common-law approach and set out to overcome it by the assumption of governmental responsibility by a state or federal jurisdiction to review and often to administer the compensation system. Supervising the security of payments was also vested in government. The recognition of a direct governmental responsibility for the welfare of the injured worker anticipated such later developments as the federal old age and survivors' insurance program, as well as the railroad social security system, unemployment compensation and the recent temporary disability insurance programs.

Third, they set about to furnish "certain, prompt, and reasonable compensation to the victims of the work accidents and their dependents."[69] Some of the other objectives were to:

> Free the courts from the delay, cost and criticism incident to the great mass of personal-injury litigation heretofore burdening them.
>
> Relieve public and private charity of much of the destitution due to uncompensated industrial accidents.
>
> Eliminate economic waste in the payments to unnecessary lawyers, witnesses, and casualty corporations and the expense and time loss due to trials and appeals.[70]

(c) *Effect of Workmen's Compensation on the Liability Act*

So widespread has been the adoption of these principles, so great has been their impact on subsequent social legislation and on our developing concept of social insurance, that they have perforce influenced even those laws which retained the tort basis for employers' liability. The tendency to amend the liability acts by reducing the number of employer defenses is essentially a movement toward insuring a greater share of work injuries. This trend, however, cannot be fully effective under a negligence-oriented system and it is in large part negated by the interchangeability of common-law defenses. Thus, when the Federal

[69] From a statement of objectives set forth in the First Annual Report of the Compensation Commissioners of the State of Washington, Industrial Insurance Department. FIRST ANNUAL REPORT at 6 (1912), which is quoted here from DAWSON, PROBLEMS OF WORKMEN'S COMPENSATION ADMINISTRATION 5-6 (U. S. Dep't Labor, Bull. No. 672, 1940).

[70] *Ibid.*

Employers' Liability Act made contributory negligence no longer an absolute defense under the law, employers could contend that continuation in employment when an employee was aware of some unsafe condition which formerly might have been characterized as contributory negligence, instead constituted assumption of risk. Similarly, following the 1939 amendments, when the assumption of risk defense was eliminated, the employers could readily transform it into a denial of negligence or, if necessary, convert it back to contributory negligence and thus restrict recovery under the comparative negligence rule. Thus, despite the reduction in the number of employer defenses, the same arguments are still advanced. They are still very much to the point so long as negligence remains the basis of action.

The principles of workmen's compensation laws have also influenced courts and juries acting in liability cases. As a result, there is no small volume of opinion that the doctrine of negligence has become atrophied. The claim is commonly made by claimants' attorneys that employer negligence can be established in virtually every injury.[71] Such claims, though exaggerated, are far from groundless. As Justice Holmes observed in the statement quoted earlier, juries tend to find for the injured employee, regardless of negligence. Since the prevailing law for work injury compensation outside of the liability acts also ignores negligence, this tendency of juries has been greatly reinforced. Nevertheless, negligence remains the basis for recoveries under the federal act and the courts have no alternative but to give proper recognition to it.

Justice Black made this point in the opinion of the Supreme Court in *Wilkerson v. McCarthy*:[72]

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[71] This is well illustrated by the following excerpt from the text of an address given by S. C. Lush, former manager of the Brotherhood of Railroad Trainmen Legal Aid Department:

> I have been connected with . . . the Legal Aid Department for over 25 years and I am, therefore, in a position to speak to you in regard to the number of employees in train and yard service who are injured as a result of the fault of the railroad company. I think we can safely say that 99 percent of the injured men I have heard of were injured through the fault of the railroad company and that the company was legally liable, if you were able to establish those facts. THE RAILROAD TRAINMAN, (Jan. 1947).

[72] 336 U. S. 53, 61-62 (1949). Justice Frankfurter, in his concurring opinion in the same case, summarizes the problem most effectively, *id.* at 65-66 (1949):

> The difficulties in these cases [suits under the Federal Employers' Liability Act] derive largely from the outmoded concept of 'negligence' as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. For reasons that hardly reflect due regard for the interests of railroad employees, 'negligence' remains the basis of liability for injuries to them. It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under

> There are some who think that recent decisions of the Court which have required submission of negligence questions to a jury, make for all practical purposes a railroad an insurer of its employees. . . . This assumption . . . is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact. . . .

However much one may concur in the desirability of converting the Federal Employers' Liability Act into a measure for the absolute insurance of work injuries, and however much considerations of equity and sound industrial relations may argue for it, the fact is that the Act will not be metamorphosed into a sound workmen's compensation law without fundamental revision of its provisions. Congress, first, would have to discard negligence as the basis for compensation, develop a far more explicit benefit formula than the vague common-law concept of "damages" and completely revise the basis of administration.

To leave the administration of work injury claims to negotiations conducted individually between employer and employee is not satisfactory. Nor is it practical to increase the number of cases brought into the courts for adjudication. The courts are not set up to process more than a small proportion of the claims resulting from work injuries and, even if they were, there is little evidence to suggest that the results would be any more salutary than they now are. The administrative shortcomings of court adjudication are very well summarized in a review of experience under the New Jersey Workmen's Compensation Law which led to its abandonment:

> In short, administration of a workmen's compensation law through the courts, a number of separate and scattered tribunals already overburdened by their ordinary business . . . results harmfully, in that (1) serious delays occur, defeating one main purpose of a compensation law, namely to care for the injured or his dependents financially during the period of no earnings; (2) fees necessarily paid to attorneys eat up large portions of the awards; . . . (4) conflicting opinions are handed down, confusing and complicating the whole system and making justice a matter of location, not of law; and finally (5) many meritorious claims are not pressed because of fear that court action will result in dismissal from employment. A more unsatisfactory system, from the injured worker's point of view, would be hard to devise.[73]

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the Federal Employers' Liability Act lead to conflicting opinions about 'fault' and 'proximate cause'. The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law.

[73] *Three Years under the New Jersey Workmen's Compensation Law*, 5 AM. LABOR LEG. REV. 30, 57-58 (March 1915). The above quotation was taken from DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936).

IV. Reasons for Retention of Present Act

Certainly, workmen's compensation has not been overlooked as an approach to railroad work injury compensation. Even a cursory review of the many bills drafted over a span of more than forty years to bring railroad workers under workmen's compensation[74] demonstrates how frequently and thoroughly railroad coverage has been considered. Various Justices of the United States Supreme Court have issued what almost amounts to an invitation to Congress to enact a workmen's compensation law for railroad injuries.[75] Government-sponsored investigations have resulted in the uniform conclusion that the liability law is unsatisfactory.[76] Railroad labor organizations are divided on this issue but the majority has come to the same conclusion.[77] A leading spokes-

[74] See appendix, pp. 271-72, *infra,* for a compilation of measures introduced in Congress providing for or relating to the compensation of railroad employee work injuries by workmen's compensation.

[75] Douglas, J., delivering the opinion of the court in Bailey v. Central Vermont Railway, 319 U. S. 350, 354 (1943) stated:

> That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive, as compared with the more modern systems of workmen's compensation but, however inefficient and backward it may be, it is the system which Congress has provided.

Justice Frankfurter's concurring opinion in the decision of the court in Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 71 (1943), reads in part:

> Unlike the English enactment which nearly fifty years ago recognized that the common-law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the Federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most States in establishing systems of workmen's compensation not based on negligence. . . . But until Congress chooses to abandon the concept of negligence, upon which the act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot disregard the principle. . . .

See also note 72 *supra.*

[76] The three principal government-conducted investigations are those of The Employers' Liability and Workmen's Compensation Commission (1908-1910) (see note 30 *supra*); the Federal Coordinator of Transportation (1932) (see note 33 *supra*); and the Railroad Retirement Board (see note 9 *supra*).

[77] A policy statement of the Railway Labor Executives' Association which represents approximately 80 percent of railroad employees appears in Labor and Transportation Program and Objectives of Transportation Labor in the Post-War Period 39 (May 1946):

> Railroad labor has advocated and recommended an elective system of benefits for railroad workers to meet the hazards of industrial diseases and railroad accidents. There is no federal system and employees engaged in interstate commerce are not covered by the several state workmen's compensation acts. The establishment of adequate protection should not be further delayed.

The division of opinion among railroad labor organizations is between the unions representing train and engine service employees and those representing non-operating employees. As a group, the former employees fare somewhat better under the federal act than do the non-operating employees but the over-all results are basically unsatisfactory for both groups of employees.

man for the Association of American Railroads has agreed that the Act "should not be on the statute books at all; but should be supplanted by a well-thought-out and carefully considered measure which will put the railroad workers under suitable workmen's compensation acts. . . . "[78]

Why have these recommendations gone unheeded? Numerous obstacles have, through the years, stood in the way of workmen's compensation on the railroads. Until rather recently there was some concern as to whether Congress could pass such a measure under its powers to regulate interstate commerce.[79] Furthermore, there has been a continuing inability of railroad management and labor to agree on the essential provisions of such a measure. The railroads have objected strenuously to bills that incorporate an elective feature which would give an injured employee the option of coming under workmen's compensation or pursuing his claim under the Employers' Liability Act. Under such a plan, the railroads have contended, they would have to insure all injuries regardless of negligence under workmen's compensation, while they would continue to be exposed to additional liability under the federal act for injuries caused by their negligence.[80]

Chances for accord have been in a large part diminished by unavailability, at least to labor and the public, of sufficient facts upon which to base an evaluation of the law.

Vested interests have crystallized around the efforts of railroad workers to secure compensation for their injuries. Representation of claimants is a million dollar business; in lean years the legal fees paid by scarcely a thousand injured workers exceed $1,000,000. As is natural, the method of claim settlements has become institutionalized and interests have vested in its continuance.

A distinction must, however, be made between the recognition of the inadequacies of the Federal Employers' Liability Act and the willingness to promote workmen's compensation as an alternative.

In my opinion railroad labor has failed to take an aggressive stand on this matter, largely because of disillusionment over the inadequacies of state compensation laws and because the various organizations have been reluctant to pursue a course which might contribute to greater division of opinion among railroad labor unions. They also recognize the futility of trying to obtain legislation providing higher benefits than the railroads would approve while railroad labor remains divided on this issue.

[78] Judge R. V. Fletcher (General Counsel, later President of the Association of American Railroads) appearing before Senate Committee on hearings on 1939 amendments to FELA.

[79] In Alton v. Railroad Retirement Board, 295 U. S. 330 (1935), the Supreme Court indicated, possibly for the first time, by way of dictum, the constitutionality of a workmen's compensation system for railroad employees.

[80] See *Comments by F. C. Squire, Member, Railroad Retirement Board, on the Board's Report on "Work Injuries in the Railroad Industry, 1938-1940"*, WORK INJURIES, *supra* note 9 at 219.

The preferential treatment received by employees who win at the lottery or who, because of their favored standing in the community, are offered premium settlements by the railroad has led many employees to entertain the notion that they, too, if injured, might win in the liability law contest. This essentially spurious expectation of large awards is encouraged by claimants' attorneys and results in the toleration by some of a system that could never be justified by its results as a whole.

A particularly important development in the railroad industry which surrounds the work injury problem and has tended to ameliorate its results is the comprehensive railroad social insurance system. In this system Congress has, in fact, adopted a very advanced expression of the insurance principle. Sickness and Survivor's Insurance[81] benefits are paid with respect to all disabilities regardless of work origin and irrespective of cause, although the former must be repaid out of any work-injury pay settlement. Workers who are permanently disabled for all employment or for their regular jobs are entitled to a lifetime benefit under the Railroad Retirement Act,[82] regardless of the origin of such disabilities and independently of any injury settlement. Older workers are, of course, entitled to old age retirement benefits. These important and far-reaching social insurance measures have tended to meet, at least in part, some of the need for protection against work injuries. While they are not primarily intended to meet this need, they encourage certain workers and a good number of attorneys to gamble for "jackpot" recoveries that are still possible under the liability act.

Railroad labor can hardly fail to observe the low level of present workmen's compensation benefits which are paid for railroad injuries coming under some state laws. The benefits, originally modest, have in certain states been permitted to become penurious. By and large, the example set by these laws offers railroad labor little hope of improvement even where they recoguize that the Federal Employers' Liability Act does not now and cannot possibly ever meet the requirements of a suitable compensation method for their injuries. Labor is unwilling to accept a level of benefits which is, or might soon become, inadequate. Many labor officials feel that a law of this type would substitute for the possibility of getting a satisfactory settlement, the certainty of an inadequate one.

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81 The sickness insurance benefits are provided under the Railroad Unemployment Insurance Act, 53 STAT. 1113 (1939), as amended, 45 U. S. C. 351-367 (1940). The survivor benefits are provided under the Railroad Retirement Act, 49 STAT. 967 (1935), 50 STAT. 307 (1937), 45 U. S. C. 228 (1940); 60 STAT. 722 (1946), 62 STAT. 576 (1948), 45 U. S. C. 228 (Supp. 1949).

82 See note 81 *supra*.

Despite their insecurity under and dissatisfaction with the liability law, railroad workers, in fact, have considerable opposition to state compensation laws. They object not only to the benefit levels but to numerous other features—among them the maximum benefit and duration provisions, permanent partial disability schedules, occupational disease provisions and extent of medical care provided. Many of these provisions seriously restrict the amount and extent of protection afforded by these acts. It is inadvisable to attempt to bring railroad workers under workmen's compensation by making them subject to the applicable state laws. The state-by-state method would mean a maze of inconsistent laws with unwarranted inequalities across geographic and jurisdictional lines. These objections could only be effectively overcome by a federal workmen's compensation plan.

V. Workmen's Compensation Plan for Railroad Industry

The Railroad Retirement Board's findings point to the inescapable conclusion that both the railroads and their employees would benefit greatly from the enactment of a workmen's compensation system. Some of the essential features of a suitable compensation system are suggested by these findings and by the incidental research and analysis. The more important of these features are here outlined.

(*a*) *Benefit Levels*

Selection of a benefit level is the most important and, at the same time, the most difficult element to establish. Railroad workers are now entitled at least in theory to full damages for injuries resulting from employer negligence. As was shown earlier, at least for temporary total disabilities, many employees, in fact, do receive three-fourths or more of their lost wages. To be acceptable to railroad employees a compensation system must, therefore, offer a satisfactory compromise for surrendering the uncertain right to full damages in return for an assured entitlement to a smaller but recognizably adequate benefit.

There is nothing in theory which establishes any one ratio as a proper or just apportionment of the wage losses between the employer and employee. In many of the early state compensation laws the level of benefits represented a "fifty-fifty" apportionment of wage losses. Today the statutory benefit level ranges from 50 to 70 percent and the trend is in the direction of higher benefit levels. The most common benefit level thus far adopted divides the losses into thirds; the employer is liable for two-thirds, the employees for one-third. This aspect of work-

men's compensation is no complete departure from the liability laws. The bargaining, however, is not done between the employer and employee over each injury after it occurs; instead the liability is agreed upon in advance. It is pertinent to recall the words of President Taft, who stated that "the old rules of liability under the common law were drawn by men imbued with the importance of preserving the employers from burdensome or unjust liability."[83] The same motivation was evidently not abandoned in the formulation of existing workmen's compensation measures.

Fear of *over-insurance* and *malingering* has also tended to bring about incomplete wage loss restoration as a motivation or compulsion for the injured employees to get back to work as soon as possible. However, the only valid answer to malingering is a technical one—better methods must be found or employed for verifying disability. The answer is not to penalize all workers—including those who cannot possibly malinger —because some might do so.

If there is no ready criterion for setting a proper benefit level, there are compelling social considerations which call for an adequate one. Although the railroad is initially liable for compensation, the consumer ultimately pays for the cost of injuries. The price he pays cannot adequately compensate for the lives lost and distress caused, but it should include reasonable compensation for the wages lost by those injured in producing the product or service. Where compensation is inadequate the burden is not really evaded, it is merely shifted. In the first instance insufficient compensation imposes on the worker or his family an excessive share of the losses, which is unjust. Where the inadequacy compels him or his survivors to turn to charity or public assistance, which is often the end product of an inadequate award, the public in general must pay for the costs which were spared the consumer. This course may be somewhat cheaper but the saving at the expense of the injured worker and the general public is unjustifiable and unwise. Actually, it may not be much cheaper, considering the total costs, including such hidden elements as the cost of public relief benefits as well as the costs incurred when a few individuals break through and are paid exceedingly large awards, often sufficient to compensate several workers quite adequately.

In designing a compensation system an important factor is whether the benefits are to be elective or exclusive. The question to be resolved in this connection is whether an injured railroad employee should have

[83] See note 29 *supra*.

the option of going outside of the compensation system to seek damages for injuries caused by employer negligence. If benefits are set at a sufficiently high level, such an elective provision would appear to be inadvisable. The objective of a compensation system should be to provide adequate protection against the consequences of all disabilities of occupational origin and not special treatment for those who appear to have strong cases—in practice the strength of such cases often proves illusory. An elective system would interfere with the most effective allocation of compensation among injured workers. Outside of the railroad industry, organized labor generally is critical of the shortcomings of existing workmen's compensation laws but nevertheless believes that the solution is not to encourage suits outside of the workmen's compensation system—and certainly not to abandon workmen's compensation—but to provide more adequate and more certain benefits for all workers who suffer work-connected disabilities.[84]

(*b*) *Minimums and Maximums*

Workmen's compensation laws customarily provide that benefits shall not fall below certain levels, nor may they exceed certain maximum amounts. The minimum provisions are desirable in protecting learners, helpers, apprentices and other employees with low pay rates. This protection is often more theoretical than actual because the minimums are frequently too low to affect any substantial number of such workers.

The maximums, however, are far too effective. In recent years actual compensation has more often been determined by the maximum provisions than by the statutory benefit rates. Generally the maximums are set as fixed amounts as if our wage structure itself were frozen for indefinite periods. No provision is made for periodic review and adjustment except by legislative enactment.[85]

A common weekly maximum is $25. In a state with this limitation and a statutory benefit level of 66 2/3 percent, all employees whose average weekly wage is slightly more than $37 when injured receive less than the prescribed benefit level. It is true that the maximums have from time to time been adjusted, especially in recent years. But in most states and for long periods the adjustments have failed to keep step with

84 See, *e.g.*, *Resolution No.* 56, at 59-61, REPORT OF THE RESOLUTIONS COMMITTEE (12th Const. Conv., C.I.O. 1950).

85 Under the liability act new settlements have, to an extent far surpassing our workmen's compensation laws, reflected the rising wages and prices. However, it is not much better with respect to disabilities of extended duration. A cash settlement which takes account of the worker's loss computed according to current wages at the time of injury is almost invariably insufficient for a permanent injury with the passage of time.

wages and prices. With a rising price level, which apparently is a continuing trend of our economy, a fixed maximum, however reasonable it may appear at the time of enactment, becomes restrictive with the passage of time.

That wages may continue to rise is now generally recognized not only in the prognostications of economists but in an increasing number of important collective bargaining contracts providing for automatic "improvement factors" and "escalator clauses."[86]

In developing a satisfactory workmen's compensation plan for railroad workers the maximum benefit provision should be set so as to affect only a sufficiently limited proportion of workers at the upper wage levels. It should not override the intended relationship between compensation and wages for the great majority of injured employees. The only manner in which such a maximum can be fixed without requiring Congress to review the field continually is to relate it to wages by some reasonable formula which permits the maximum to be adjusted as wage levels change.

(c) *Compensation for Permanent Partial Disabilities*

A far-reaching revaluation is needed of the entire procedure governing compensation for permanent partial disabilities. The payment schedules now in general use are arbitrary, inconsistent, and often inadequate. Compensation should be determined according to the individual's loss of earning capacity, taking into account such factors as age and occupation. If the permanent loss does not diminish earning capacity because of the worker's job adjustment, consideration should nevertheless be given to the potential loss which affects other employment and compensation might be provided in such cases according to a schedule. Indemnification for the period of temporary total disability which accompanies most permanent injuries should be paid in addition to the compensation for the permanent impairment.

(d) *Duration of Benefits*

An essential requirement of a properly drafted compensation law is that medical care and cash benefits for continuing disability be paid for the entire duration of disability or dependency and not be made subject to arbitrary maxima.

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[86] A good example is the collective bargaining agreement of 1950 between the General Motors Corp. and the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O.

(e) *Compensation for Occupational Diseases*

Occupational diseases should be given the same status as any other disability resulting from the employment and no special penalties should be attached such as a maximum benefit amount or duration so long as the disability itself continues.

(f) *Compensation for Disfigurements*

Compensation should be paid for injuries which disfigure an employee by scarring or misshaping some member of his body. In determining the amount of such compensation, proper recognition should be given to any curtailment of the individual's opportunities to find employment in the future as well as the social and psychological effects of the disfigurement.

(g) *Average Wage*

In determining all compensation benefits the average earnings used as a base should not be less than the worker's rate of pay for full-time work; the formula should allow for normal overtime. For long-term injuries, the average should be adjusted to correspond to normal increases in earnings during continuance of disability, or if it does not properly reflect the worker's earning capacity by reason of his having been an apprentice or a learner at the time of injury or for similar reasons.

(h) *Rehabilitation*

Rehabilitation measures to restore the injured worker to maximum capacity are fully as important as the cash provisions of a compensation system because of the predominant importance wherever possible for the injured worker to engage in useful activity rather than to stay at home and suffer almost inevitable deterioration. Rehabilitation should include adequate income maintenance during retraining as well as timely instruction in the use of prosthetic devices and in the acquisition or development of suitable and remunerative vocational skills, and placement services.

(i) *Administration of Workmen's Compensation*

Finally, in the administration of the workmen's compensation plan the more serious mistakes both of the liability law and of some of our state compensation systems should be avoided. To leave settlement as a matter of negotiations between the claim agent and the injured employee, with governmental review only of contested cases, is bound to

operate to the detriment of the workers in many cases. Even recognizing the advisability of a sparing approach to the matter of government intervention in relations between employer and employee, it still appears advisable to vest the administration of workmen's compensation with government and to give the administering agency the responsibilities and duties which are necessary for sound administration. A tripartite board consisting of labor, management and public representatives is democratic and has proved workable in the administration of the other phases of railroad social security.[87] Such a board should receive the claims for compensation and be responsible for their adjudication and for the receipt and disposition of appeals. It should also maintain an insurance fund financed by employer payroll taxes. Such taxes should be periodically adjusted on the basis of experience to allow employers credit for the results of their safety efforts as reflected in lower costs due to fewer and less severe injuries and diseases.

VI. Conclusions

The corporeal and moral health of the Federal Employers' Liability Act was given a thorough check-up by the Railroad Retirement Board. That it was found wanting is hardly debatable. Indeed, any objective appraisal of this Act is bound to sound like a denunciation. The Act failed to meet virtually every criterion of a well-designed and equitable compensation system. When an employee is injured, instead of assuring him that his job and compensation rights will be secure, it places him in conflict with the employer jeopardizing both of these rights. Its most glaring inadequacy is the uncertainty and unpredictability of compensation as it affects both the injured employee and the carrier. It arbitrarily handles injured employees by what amounts to a cruel lottery refusing to pay unlucky employees who have insufficient bargaining power for one reason or another, who may be unfortunate in not having witnesses to support their claims, or who may be simply ignorant of their rights. It permits the employer in some cases to evade responsibility through an obscure and metaphysical claim of non-negligence. In others, it requires the employer to pay several times the actual losses incurred. There is an appalling economic waste in a system which, at the same time that it inadequately compensates most victims of injury, spends disproportionate sums for expenses incidental to litigation.

[87] The Railroad Retirement and Unemployment Insurance System providing old-age and disability retirement benefits, unemployment and sickness insurance benefits. See note 81 *supra*.

The liability act is unsound both in principle and in practice; workmen's compensation is basically correct in theory but needs certain improvements.

The rejection of workmen's compensation by railroad workers is, in a very important sense, one of the most serious criticisms of the present inadequacies of these laws. For the problem of developing a sound system for the compensation of railroad workers is not unique. Apart from their origin in interstate commerce, railroad injuries differ from those in other industries mainly in their frequency and severity, but not in the essential compensation problem. The standards that would provide a satisfactory law for the railroads would also make for a sound compensation plan for other industries.

The Senate, in directing the Railroad Retirement Board to conduct its investigation of work injuries, intended that the investigation should supply information which would "serve as background in the formulation of legislative policies".[88] The results point inexorably to the need for workmen's compensation. This need continues. It is not overcome by the "jackpot" awards to a few workers. It will not be met by any system that offers anything less than reasonable compensation to all workers who are disabled through their jobs; until the principle of social insurance for work injuries and diseases, which is workmen's compensation, is adopted.

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88 "The time has come," wrote the Clerk of the Senate Interstate Commerce Committee, "when the whole subject . . . should be comprehensively investigated in the light of, and as part of the development of social insurance in the railroad industry." *Purpose and Scope of Sen. Res. No. 128,* WORK INJURIES, *supra* note 9, preceding p. i.

APPENDIX

A Compilation of Measures Introduced in Congress Providing for or Relating to the Compensation of Railroad Employee Work Injuries by Workmen's Compensation

Congress	Session	Date	Bill or Resolution Number	Introduced by	Purpose of Bill or Resolution	Disposition or Action
60th	1st		H.R. 16061 H.R. 16739	Sabath	Workmen's compensation system, elective	Referred to House Judiciary Committee. Hearings held.
60th	2nd		H.R. 24339 H.R. 25408	Sabath	Workmen's compensation system, elective	Referred to House Judiciary Committee.
61st	1st	1910	H.R. 1	Sabath	Workmen's compensation system, elective	Referred to House Judiciary Committee.
61st	2nd	1910	H.J. Res. 127	———	Appointment of commission to investigate employers' liability and workmen's compensation	Referred to House and Senate Judiciary Committees; passed both houses; commission appointed; investigation conducted. Report published.[1]
62nd		1911	H.R. 8654	D. J. Lewis	Workmen's compensation system, elective	Referred to House Interstate and Foreign Commerce Committee. Hearings held.
62nd	2nd	1912	S. 5382 H.R. 20487	Sutherland Brentley	Workmen's compensation system, exclusive	Referred to Judiciary Committees; hearings held.[2]
62nd	2nd		H.R. 21962	Sabath	Workmen's compensation system, elective	
63rd			H.R. 2944	Sabath	Workmen's compensation system, elective; would also include civil employees of U.S. Government	
63rd	1st	1913	S. 959	Sutherland	Workmen's compensation system, exclusive	
63rd	1st	1913	H.R. 21 H.R. 6534	Davis	Workmen's compensation system, exclusive Workmen's compensation system, exclusive	
63rd	1st		H.R. 19310	Mott	Workmen's compensation system, elective	
63rd	2nd		H.R. 15700	Cramton	Workmen's compensation system, exclusive	Referred to House Judiciary Committee.

APPENDIX (*continued*)

Congress	Session	Date	Bill or Resolution Number	Introduced by	Purpose of Bill or Resolution	Disposition or Action
63rd	3rd		H.R. 21273	Hamlin	Workmen's compensation system, elective	Referred to House Committee on Interstate and Foreign Commerce.
64th		1916	S. 4673	Sutherland	Workmen's compensation system, exclusive	
64th			H.R 466	Sabath	Workmen's compensation system, elective	Referred to House Committee on Interstate and Foreign Commerce.
64th	1st		H.R. 3651	Hamlin	Workmen's compensation system, elective	
65th			H.R. 2319			
65th	2nd	1918	H.R. 46	Switzer	Workmen's compensation system, exclusive (similar to Sutherland bills)	Referred to House Judiciary Committee and to House Committee on Interstate and Foreign Commerce.
67th	1st	1921	H.R. 5582	Barbour	Workmen's compensation system, exclusive	
72nd	1st	1932	S. 4927	Wagner	Workmen's compensation system, exclusive	
		1933	S. 5695			
73rd	2nd	1934	S. 3630	Wagner	Workmen's compensation system, exclusive	
74th	1st	1935	S. 2793	Wagner	Workmen's compensation system, exclusive	
74th	1st		S. 3152	Wagner	Workmen's compensation system, exclusive	
76th	1st	1939	S. 2862	Wagner	Workmen's compensation system, exclusive	
77th	1st	1941	S. Res. 128	Wheeler	Directed Railroad Retirement Board to conduct investigation	Referred to Committee on Interstate Commerce. Investigation conducted; Report issued to Senate Committee.

Note: The compilation is believed to include all the major bills introduced in the period covered by the table. For the items included there are some omissions in dates and in the disposition of the actions shown.

Two early bills are excluded from the above compilation which may have involved a workmen's compensation plan. These are (a) S. 2032, 48th Congress, 1st Session, 1884, (Bowen), a bill "to protect employees of railroad corporations engaged in interstate commerce . . ." and (b) S. 498, 54th Congress, 1st Session, 1896, (Call), a bill "to provide for adequate compensation to employees of railway corporations engaged in interstate commerce when disabled or killed in line of duty."

[1] 62nd Congress, 2nd Session, *Senate Document No. 338, 2 vols.*

[2] 62nd Congress, 2nd Session, *Senate Document No. 479.*